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In The

Supreme Court of the United States

October Term 1982

GREYHOUND RENT-A-CAR, INC.,
Petitioner,

v.

The CITY OF PENSACOLA, and DOLLAR RENT-A-CAR SYSTEM, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Thomas W. Lager
Lager, Woodward, O'Steen & Banks
P.O. Box 494
Tallahassee, FL 32302
(904) 222-4848
Counsel of Record

Douglas C. Kearney
Law Offices of Douglas C. Kearney
Suite 201
216 West College Avenue
Tallahassee, FL 32302
(904) 222-4848

and

William VanDercreek
800 Two Turtle Creek Village
Dallas, TX 75201
(214) 559-2900

October 29, 1982

Counsel for Greyhound Rent-A-Car, Inc.

QUESTIONS PRESENTED

1. Whether an agreement negotiated with the City attorney by one of five bidders (Dollar) for four airport car rental concessions to indemnify potential violations of the federal antitrust laws if the City would reject a competing bid (Greyhound) *cannot,* as a matter of law, constitute an agreement under § 1 of the Sherman Act?

2. Whether an indemnity agreement, embracing prospective violations of the antitrust laws, so fundamentally subverts the national public policy as to be sufficient evidence in quantum and quality of the element of agreement in a § 1 Sherman Act private civil action?

3. Whether the opinion of the Court of Appeals for the Eleventh Circuit should be summarily vacated for failure to follow on rehearing the intervening decision of this Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, _____ U.S. _____, 102 S. Ct. 1935 (1982)?

PARTIES BELOW

All parties in the Court of Appeals are listed in the caption. An additional party in the District Court was granted summary judgment, from which no appeal was taken. The Petitioner, Greyhound Rent-A-Car, Inc., is a subsidiary of Greyhound Corporation. Through the parent corporation, Petitioner is affiliated with forty other subsidiaries of Greyhound: Brewster Transport Company Limited; California Parlor Car Tours Company; Carey Transportation, Inc. (sold June 30, 1982); Gray Line New York Tours Corp. (sold June 30, 1982); Greyhound Lines, Inc., Greyhound Lines of Canada Ltd,; New Mexico Transportation Company, Inc.; Red Top Sedan Service, Inc. (sold June 30, 1982); Texas, New Mexico & Oklahoma Coaches, Inc.; Vermont Transit Co., Inc.; Motor Coach Industries, Inc.; Glacier Park, Inc.; Greyhound Food Management, Inc.; Greyhound Support Services, Inc.; Post Houses, Inc.; Restaura, S.A.; Armour and Company; Armour-Dial, Inc.; Armour Handcrafts, Inc.; Armour International Company; Greyhound Computer Corporation; Greyhound Financial & Leasing Corporation AG; Greyhound Leasing & Financial Corporation; Greyhound Realty Corporation; MCI Acceptance Corp.; Pine Top Insurance Company; Shorrock Security Systems Limited; Travelers Express Company, Inc.; Verex Corporation; Aircraft Service International, Inc., Consultants & Designers Inc.; Dispatch Services, Inc.; Florida Export Tobacco Co. Inc.; Greyhound Exhibitgroup Inc.; Greyhound Exposition Services, Inc.; and Greyhound Temporary Personnel, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 676 F.2d 1380 (1982). The memorandum denial of rehearing by the Court of Appeals is not reported. There is no opinion from the District Court. There is a judgment entered upon jury verdict finding defendants not liable after the initial segment of a bifurcated trial. The opinion, denial of rehearing and judgment are reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1982. A timely petition for rehearing, for which a timely request for enlargement of time had been granted, was denied on August 2, 1982. This petition has been timely filed on or before November 1, 1982. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1337(a). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 15 § 1 provides in pertinent part:[1]

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal ....

STATEMENT OF THE CASE

This antitrust litigation, concerning the propriety of an indemnity agreement made in contemplation that future conduct of the Respondents could violate the antitrust laws, arose from the awarding of car rental concessions at the Pensacola, Florida airport. Petitioner-Greyhound's appeal was initially predicated upon the trial court's errors in giving jury

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[1]The remainder of this section, containing criminal penalties, is not relevant here since this was a civil action seeking damages and injunctive relief pursuant to 15 U.S.C. §§ 15 and 26.

instructions and the admission and exclusion of certain evidence. The Court of Appeals, however, found it unnecessary to rule on those matters, because it determined as a matter of law that no agreement existed within the meaning of Section 1 of the Sherman Act. 676 F.2d at 1383.

Regarding the legal issue of a Section 1 agreement and the grounds for seeking Certiorari from this Court, the underlying facts are not complex. Five bids were received by the City of Pensacola for four airport car rental concessions. On the basis of the amount of the bids, Greyhound would have received a concession award and Dollar would not have. Dollar then complained to the City that Greyhound did not meet the so-called national specifications. Greyhound contended it met the national specifications. In addition Greyhound argued (and Dollar disputed) the specifications were illegal restraints of trade under the antitrust laws, noting that the other bidders, Hertz, Avis, and National (but not Dollar), were precluded from urging the use of them under an F.T.C. consent decree. 676 F.2d at 1381-1383.

At this juncture, the City, instead of acting unilaterally to accept or reject the various bids, delayed matters to consider obtaining an indemnity agreement, as was expressly discussed in a formal meeting of the City Commission members:

> "MR. BROWN: You mean you don't think we will get an overnight indemnification for any real—
>
> MR. REEVES: I am telling you I don't think we are going to get an overnight in this public meeting.
>
> MR. KLEIN: Mr. Rose?
>
> MR. ROSE: I was going to say, I think Mr. Reeves is beating around the bush.
>
> Is Dollar and Avis willing to help pay the costs of the suits?

I am just laying it on the table . . . . "

(Exhibit 48, p. 21).

The city attorney proceeded to act accordingly and admitted negotiating with Dollar for an indemnity agreement if Greyhound's bid would be rejected:

> " . . . I was trying to be a little on the safe side. I had been dealing with Henry Barksdale, who's a local attorney, former city attorney, as a matter of fact. Henry was representing Dollar Rent-A-Car and I asked him at some point in time, and as I say, I don't recall exactly when the discussions were, but he had represented to me that if the city rejected Greyhound's bid that there would be no antitrust liability. So I told him to put his money where his mouth was, so to speak, and, "If you're so sure, how about giving us an indemnification agreement?" Mr. Barksdale agreed to do that and did so in his letter of February 22, 1979. In order to be on the safe side, instead of just relying on Henry, I said, "Hey, why don't you get some authorization from," I think Paxton was the fellow that I dealt with before; he was the vice-president, but he was more active than the president. So I believe I asked him to get something in writing from Mr. Paxton authorizing him to do so." (Vol. X, Caton, p. 50).

Thereafter, as a result of these efforts, the attorney for Dollar (Barksdale) sent an indemnity letter to the city attorney (Caton) (Ex 157, set out in Appendix, *infra*), and delivered a copy of an authorization telegram from Paxton, vice-president of Dollar (Ex 158, set out in Appendix, *infra*).

At the Council meeting to award the concessions, the city attorney advised that Greyhound did not operate "nationally"

as set forth in the bid specifications because it did not have rental facilities in more than 25 states. Prior to Dollar's negotiations, the term "national" had not been defined. There was no evidence to support the need for a Pensacola airport car rental concession to operate in 26 or more states. Indeed, the city attorney acknowledged at trial Greyhound met all the other bid criteria.[2]

The Court of Appeals' opinion by Judge Hill reasoned Greyhound "failed to prove the first element of its Section 1 claim" because Dollar and the City in their indemnity negotiations had not agreed on the specific details of effectuating Greyhound's exclusion. 676 F.2d at 1383. The use of the national specifications as defined by the city attorney (i.e., must operate in 26 or more states) as exclusionary criteria, was not considered evidence of "a common course of anticompetitive conduct." 676 F.2d at 1384. The Court further reasoned that the indemnity agreement should be disregarded because it was made and received by the City Attorney without the City Commission having been expressly informed of those

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[2]Mr. Caton asserted that the national requirement was considered a "material" provision in bid specifications by both the former airport managers, Mr. Hubacker and Mr. Hinkle. (Vol. X, Caton, p. 25). Hubacker testified that he did not recall telling anyone it would be essential to operate in twenty-six states. (Vol. XII, p. 282). Mr. Hinkle testified that the surveys the City had conducted about use of the national specifications and which were attached to his report made prior to the indemnity agreement and after Dollar's objection, reflected not a single airport that required a car rental concessionaire to operate nationwide or nationally in scope. Mr. Rose, a City Councilman, testified that he considered rent-it-here, leave-it-there on a local or regional basis to be important, but such a provision was not included in the specifications. (Vol. XIII, p. 414-15). Moreover, Mr. Caton, the City Attorney, admitted that Greyhound met the rent-it-here, leave-it-there provision as it was stated in the concession agreement bid specifications. (Vol. XI, Caton, p. 14-15).

events prior to the City attorney advising the Commission to reject Greyhound, which the Commissioners then voted to do. 676 F.2d at 1384.

Analyzing the indemnity agreement itself, the Court of Appeals determined it to be a gratuitous, aleatory offer which failed to prove a joint anticompetitive purpose because it did not bind the City to any particular course of action. 676 F.2d at 1384. The City, however, in a judicial admission under Rule 36 that was published at trial, conclusively admited:

> "Dollar agreed to indemnify, hold harmless or otherwise protect the City from litigation that Greyhound might file if its bid were rejected." 676 F.2d at 1384, n. 10.

Even though the Court of Appeals held, as a matter of law, there was no agreement for antitrust purposes, it acknowledged that there may be a perfectly valid contract of indemnity:

> "Again we caution that we express no views on the legal enforceability of Dollar's obligation. Our comment is directed solely to the language of Plaintiff's Exhibit 157 insofar as it is pertinent to finding a contract, combination, or conspiracy between the defendants. See note 10 supra." 676 F.2d at 1384, n.11.

The Court of Appeals did not refer to the argument advanced by Greyhound in its briefs and at oral argument that an agreement by one member of a combination to indemnify the other member from the consequences of future violations of the antitrust laws[3] is itself so plainly violative of national public policy as to be an illegal restraint of trade within the meaning of the Sherman Act.

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[3]The indemnity agreement covered any action taken by Greyhound against the City because of Greyhound's exclusion. The agreement

On Petition for Rehearing, the Court of Appeals was not persuaded that its opinion conflicted with the intervening decision of this Court in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, ___ U.S. ___, 102 S. Ct. 1935 (1982), as to the City Attorney's agency relationship with the City Commission and his actual authority. Neither was the Court of Appeals persuaded its opinion conflicted with a long line of this Court's opinions establishing the quantum and quality of proof necessary to show a Sherman Act agreement. The Court of Appeals further declined to rehear its treatment of the judicial and testimonial admissions of the agreement, and would not reconsider whether it had applied criminal law standards of analysis to this civil action.

The Petition for Rehearing was denied without comment. Greyhound now brings this Petition for Certiorari.

Footnote Continued

specifically referred to the antitrust violation alleged, but was not limited to indemnifying only antitrust suits. The agreement stemmed in part from Greyhound's advising the City the material specifications employed to exclude Greyhound from competing were restraints of trade under *Hertz Corp.*, 88 F.T.C. 715 (1976). (676 F.2d at 1382, n.3.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has Decided an Important Question of Federal Law which has not been, but should be, Settled by this Court

Indemnity given before a contemplated anticompetitive act is a major evil, because it induces violations of the antitrust laws. It is therefore the most dangerous kind of agreement in violation of § 1 of the Sherman Act.

Indemnity from the potential of antitrust litigation eliminates the deterrent effect of the antitrust laws, makes more litigation necessary, and amounts to a private repeal of those laws for the indemnified party. Indemnity is therefore license—if not solicitation—to contravene federal law and national policy with impunity.

By deciding the indemnity agreement was not an agreement violative of, within the meaning of, § 1 of the Sherman Act, the Court of Appeals in this case has *pro tanto* eroded the first purpose of this law: its deterrent effect. The Court of Appeals so restrained itself to avoid deciding the question not before it, whether the agreement was enforceable, that it missed the more fundamental threshold national policy issue.

Just as the quite real burdens of antitrust liability prompted the antitrust contribution cases that had to be resolved by this Court in *Texas Industries, Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the absence of that device to shift part of the liability after the fact has spawned recourse to the greater evil, shifting total liability before the fact. While it is argued that a rule of antitrust contribution "cuts both ways"[4] regarding deterrent effect, indemnity is a single-edged sword.

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[4] *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

Unlike all prior federal antitrust indemnity cases,[5] this case presents for the first time squarely the issue of whether such an agreement is an illegal one within the meaning of § 1 of the Sherman Act, when the parties entered the indemnity agreement precisely for the purpose of effecting a specifically contemplated anticompetitive act. The Court of Appeals has held that it is not even a contract, combination or conspiracy within the meaning of § 1 of the Sherman Act. Such a decision is irreconcilable with the overarching primary national interest expressed in the federal antitrust laws and is a dangerous precendent that will encourage, rather than inhibit, further litigation through its deleterious impact on the deterrent effect of those laws. It is inconceivable that the agreement could be unenforceable on the one hand because contrary to public policy, but not at the same time be itself violative of national law when entered precisely to privately repeal that national law.

The vindication of federal antitrust policy in its deterrent aspects is a question of bedrock importance which has not been, but should be, decided by this Court.

II. The Court of Appeals has Rendered a Decision Inconsistent with the Controlling Decisions of this Court

The Court of Appeals declined, on rehearing denied, to conform its opinion to the intervening decision of this Court in *American Society of Mechanical Engineers, supra.* While this Court was indeed divided in that case, primarily over the

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[5] *Professional Beauty, supra,* 1186 (request for remand to consider separate indemnity claim denied); *Wilshire Oil Co. v. Riffe,* 409 F.2d 1277 (10th Cir. 1969) (indemnification sought by way of state claim for breach of fiduciary duty); *Bradley Auto Wash Sales, Inc. v. BP Oil, Inc.,* 1982-1 Trade Cases ¶ 64,470 (D. Mass. 1981) (cross-claim for contractual indemnification).

extension of liability to a principal whose agent acted with merely apparent—not actual—authority, the present matter involved an agent with actual authority, the *a fortiori* case upon which this Court appeared to be unanimously agreed.

In *American Society,* the anticompetitive acts were performed without the principal's knowledge at the time, although those acts were later ratified and adopted. There, the agent misused his position and cloaked his private purpose in the mantle of his principal's beneficent public welfare function, misleading others who were unaware of the agent's deviation from fidelity to his principal's competitively neutral interests.

The Court of Appeals acknowledged that one of the principals here, a City Commissioner, first raised the issue of indemnification as a desirable precursor of excluding Greyhound from the market, and that the City Attorney then negotiated for and obtained Dollar's indemnity agreement limited to that purpose before advising his principal to exclude Greyhound. By all accounts at trial, the City Attorney did not explicitly tell the City Commissioners the requisite bargain had been struck. The Court of Appeals did not explain its denial of rehearing on this ground despite the actual authority of the agent, despite the City's judicial admission of the agreement (arguably, at the least, a later ratification and adoption), and despite the business history between the City and Dollar.

Greyhound proved, briefed and argued the earlier indemnity agreement between the respondents, under which the City had breached its contract with three other airport car rental firms, and had been reimbursed by Dollar pursuant to that earlier indemnity agreement. The present indemnity agreement had *not* been created in a vacuum, as one might infer from the opinion of the Court of Appeals; the parties were full well aware of this historical course of dealing among themselves. Moreover, unlike *American Society,* there was no claim in this case that the City Attorney had acted outside, or deceived anyone as to, the scope of his actual authority:

Dollar's representative was present when the Commissioner asked about indemnification.

It is possible that the Court of Appeals misunderstood the concurring opinon of Mr. Chief Justice Burger in *American Society.* Here the agent acted openly with the knowledge, and for the benefit, of the principal, who afterwards also ratified and adopted the conduct of the agent. We recognize that summarily vacating is an infrequent practice, but it is appropriate in cases of clear error like this one. It is particularly appropriate here where the opinion of the Court of Appeals was rendered prior to the controlling decision of this Court, and where the Court of Appeals declined on timely rehearing to conform its opinion to the then controlling decision of this Court. The decision below should be vacated on that ground alone.

Should summary vacating be deemed inappropriate, however, certiorari should be granted and the case set for argument. Not only is the opinion of the Court of Appeals inconsistent with that of this Court in *American Society,* but, as to the more generalized issue of the quantum and quality of proof necessary to establish an agreement within the meaning of § 1 of the Sherman Act, that opinion is inconsistent with a long line of precedent established by this Court.

By isolating the indemnity agreement and examining it without reference to the historical and contemporaneous contexts of which that agreement was but a part, the Court of Appeals ignored the teaching of this Court in its unanimous opinion in *Continental Ore Co. v. Union Carbide and Carbon Corporation,* 370 U.S. 690 (1962). The analogous issue in *Continental Ore* was causation of damages. The Court of Appeals there had separated the woven fabric of proof into single threads, analyzing them one at a time.

The Court characterized this method of analysis *seriatim* of the constituent elements of a Sherman Act claim as

"improper." *Continental Ore, supra,* at 698-99. The Court stated the principle:

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore, supra,* at 699.

Writing for the Court, Mr. Justice White quoted from Judge McAllister's thorough summary of the law then applicable to analyzing the quantum and quality of proof necessary to show an agreement within the meaning of the Sherman Act:

> ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten,* 266 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it. *American Tobacco Co. v. United States,* 147 F.2d 93, 106 (C.A. 6th Cir.);" quoted in *Continental Ore, supra,* at 699.

This Court concluded "the Court of Appeals either overlooked or interpreted into insignificance" the facts which would have given meaning to the isolated items being analyzed. *Continental Ore, supra,* at 700. Twenty years later, the Court of Appeals below has also overlooked or interpreted into insignificance the very facts which would place the indemnity agreement here squarely within the ambit of the Sherman Act.

By narrowing its focus so tightly on the one item actually found in writing evidencing the agreement, the Court of Appeals has also departed from this Court's consistent line of authority that an agreement within the meaning of the Sherman Act may be shown without proof of any express,

written agreement, thus compounding the error of its piecemeal approach to the facts. *See e.g, Eastern States Retail Lumber Dealers' Ass'n. v. United States,* 234 U.S. 600 (1914); *Interstate Circuit , Inc. v. United States,* 306 U.S. 208 (1939); *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683 (1948); *United States v. Paramount,* 334 U.S. 131 (1948); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.,* 340 U.S. 211 (1951); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *Continental Ore, supra;* and *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969).

By demanding explicit, written evidence that both parties subscribed to a single, identical anticompetitive purpose, the Court of Appeals not only deviated from this Court's reminder that civil antitrust combinations may be proven without having to show common *specific* intent, *United States v. United States Gypsum Co.,* 438 U.S. 422, 436 n. 13 (1978), but also avoided this Court's consistent restriction of the applicability of the *Colgate* doctrine solely to conduct which is clearly unilateral. *United States v. Colgate,* 250 U.S. 300 (1919); *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922).

When a functionally similar situation was presented fourteen years ago, this Court found it sufficient proof of Sherman Act agreement that one party know the anti-competitive desire of the other and knowingly lend its aid.[6] *Albrecht v. The Herald Co.,* 390 U.S. 145 (1968). The Court of

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[6]Petitioner's parent corporation was found liable once under just that principle. The jury was instructed, "A combination results when one or more persons by their acts materially aid in the accomplishment of the plan of another person. It does not require an agreement or contract nor does there have to be a common aim or design. It is enough that one materially aids another in a plan." A.B.A. Antitrust Civil Jury Instructions (1980) at 74, quoting instruction at trial in *Mt. Hood Stages v. Greyhound Corp.,* [appeal reported at 555 F.2d 687 (9th Cir. 1977)].

Appeals erroneously imported the criminal law standard of specific intent and applied it to this civil case. Here the indemnity agreement shows a combination of the monetary power of Dollar with the administrative power of the City to achieve the anticompetitive end that Dollar desired, even more restrictive application of the market entry criteria already found by the Federal Trade Commission to be restraints of trade.[7] The Court of Appeals offers no justification for a change in the civil antitrust standards for proof of agreement from knowing assistance to common specific intent, nor does it explain its inconsistency with the decisions of this Court.

Indeed, the Court of Appeals has created and applied a new civil law standard of proof of Sherman Act agreement that far exceeds in strictness even the highest burden announced by this Court as applicable to criminal antitrust prosecutions. In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court announced the presently applicable standard of proof regarding intent in criminal antitrust cases. Writing for the Court, Mr. Chief Justice Burger stated the rule:

> " . . . [W]e conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *Gypsum, supra,* at 444, footnote omitted.

In his concurring and dissenting opinion, Mr. Justice Stevens contrasted that rule with the criminal law standard he would prefer, albeit declaring such rule-making to be the province of Congress:

> "If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate

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[7] *Hertz*, n. 3, *supra*.

> the law rather than mere knowledge that the defendants' agreement has had an adverse effect on the market." *Gypsum, supra,* at 474-75, footnote omitted.

Mr. Justice Stevens characterized that rule of knowledge of adverse market effects as "the lesser standard."

The Court of Appeals, however, has held there is no Sherman Act agreement without "an agreement or mutual commitment to engage in a common course of anticompetitive conduct." 676 F.2d at 1383. Focusing on the language of the indemnity agreement, itself an executory contract, the Court of Appeals stated it showed "the City did not commit itself either to reject Greyhound or to any other *particular* course of action." 676 F.2d at 1384, emphasis supplied. The Court of Appeals re-emphasized its conclusion that the agreement must be one evidencing a specific purpose:

> "The indemnity agreement therefore does not reflect a *mutual commitment* by the City and Dollar *to exclude* Greyhound. In short, it does not evidence the defendant's *coming to terms on a common course of action to be concertedly followed.*" 676 F.2d at 1384, emphasis supplied.

The test applied by the Court of Appeals far exceeds that of mere knowledge of adverse effect which this Court fashioned for criminal cases, and approaches, if not equals, the specific purpose test Mr. Justice Stevens would have Congress fashion for criminal prosecutions.

The national interest in enforcement of the antitrust laws requires this Court grant certiorari to correct the liberties the Court of Appeals has taken both with this Court's controlling precendents and with the prerogatives of Congress as the nation's exclusive legislative body.

III. Certiorari Should be Granted to Decide an Important Issue on Which There is a Conflict in the Circuits

Since construing the Sherman Act is similar to construing equally general constitutional provisions, *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359-60 (1933), resolution of conflicts in the circuits regarding the proper interpretation of that law is an important function of this Court. The application of the antitrust laws is a fact-specific enterprise. *United States v. United States Gypsum Co.,* 438 U.S. 422, 438 (1978). Given the variety of means creative enterprises invent to achieve their ends, and the generality of the statute, there easily arise from time to time conflicts among the circuits such as is present here.

The notion of combination, whether by contract, conspiracy, or some other joinder of separate entities, is the heart of an offense against § 1 of the Sherman Act. *See, generally,* Kintner, Federal Antitrust Law, §§ 3.2 and 9.3 (1980). The proper construction of the central feature of this law is an important issue, not only for its effect on the conduct of commerce in this nation, but also for its effect on the administration of justice in the federal courts.[8]

The uncertain state of the law in this area is illustrated by the fact that the Court of Appeals did not support with even one citation to authority its holding that the indemnity agreement did not meet Sherman Act agreement standards; in that respect, it is unprecedented.

Conflict in the circuits is illustrated by the decisions of the Ninth Circuit in *Esco Corporation v. United States,* 340 F.2d

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[8]It is also important to the administration of justice in state courts depending on this Court to guide the interpretation of state antitrust laws. *See, e.g.,* §§ 542.18 and 542.32, Fla. Stat. 1981.

1000 (1965), and *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (1975), *cert. den.* 96 S. Ct. 782.[9]

In *Esco*, the Court of Appeals agreed that the existence of a contract, combination or conspiracy was the crucial evidentiary question on appeal. The Court rejected the contention that the mutual assent a Sherman Act agreement requires must be an exchange of assurances to take or refrain from a given course of conduct. The Court summarized the applicable rules:

> "It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. [Citations omitted.] Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy. [Citation omitted.] Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy." *Esco, supra*, at 1008.

In *Helix Milling*, the Court of Appeals reversed the district court's grant of summary judgment to defendants on the § 1 Sherman Act claim. Helix's mill had been destroyed and, it was alleged, defendants agreed to prevent Helix from acquiring a ready replacement. The Court dealt specifically with the requisite quality of proof for there to be found a Sherman Act agreement, disagreeing with the district court's formulation of the rule, not unlike the formulation at issue here in the Eleventh Circuit:

> "The district court also noted that, in order to find a combination in this case, it would have been necessary to prove an agreement between defendants that

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[9]Indeed, the Ninth Circuit withdrew its earlier opinion in *Helix Milling* to treat more thoroughly the issue of common specific intent. That earlier decision is reported in 1975-1 Trade Cases ¶ 60, 372.

> neither of their mills would be sold to Helix. This misstates the rule. Proof of participation in a course of conduct that has the necessary consequence of barring entry of competition into the market would provide the basis for a finding of a combination. *Albrecht v. Herald Co.*, 390 U.S. 145, 149-150 (1968); *Pearl Brewing Co. v. Anheuser-Busch Co.*, 339 F.Supp. 945, 950 (S.D. Texas 1972). The collaboration of the person necessary to establish a combination need not even be willing, *Albrecht* at 150 n. 6." *Helix Milling, supra,* at 1321-22.

The Court of Appeals held that proof of the specific anticompetitive purpose was not required since proof of specific intent was not required.

Because the Ninth and Eleventh Circuits directly conflict on whether proof of a Sherman Act agreement must contain proof of the common specifically intended anticompetitive purpose, the state of the law is uncertain. The lower courts, litigants and the national interest alike require this Court resolve the conflict over this important question. Certiorari should be granted and the case set for argument.

CONCLUSION

For the reasons set forth, this Court should grant the petition for a writ of certiorari and summarily vacate the decision of the Court of Appeals on the authority of the *American Society of Mechanical Engineers* decision. Alternatively the case should be set for argument to decide the important Federal question presented and resolve the conflict in the law on Sherman Act agreement evidenced by this decision and the decisions of the Ninth Circuit in *Esco* and *Helix Milling*.

Respectfully submitted,

Thomas W. Lager
Lager, Woodward, O'Steen & Banks
P.O. Box 494
Tallahassee, FL 32302
(904) 222-4848
Counsel of Record

Douglas C. Kearney
Law Offices of Douglas C. Kearney
Suite 201
216 West College Avenue
Tallahassee, FL 32302
(904) 222-4848

and

William VanDercreek
800 Two Turtle Creek Village
Dallas, TX 75201
(214) 559-2900

Counsel for Greyhound Rent-A-Car, Inc.